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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

EDWARD DOBREFF and BARBARA DOBREFF, his wife, Jointly and Severally,
Appellants,

v.

TOWNSHIP OF HARRISON, a Michigan Municipal Corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS APPEAL - NONCOMPLIANCE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

EDWARD DOBREFF and BARBARA DOBREFF, his wife, Jointly and Severally,
Appellants,

v.

CHARTER TOWNSHIP OF HARRISON, a Michigan Municipal Corporation,
Appellee.

MOTION TO DISMISS APPEAL - NONCOMPLIANCE

I. OBJECT

NOW COMES Appellee herein, the Charter Township of Harrison, by and through its attorneys, HILL, LEWIS, ADAMS, GOODRICH & TAIT, wherein the object of the instant Motion is to dismiss Appellants' appeal in this cause as not being within the jurisdiction of

the United States Supreme Court for the following reasons:

1. The appeal is not properly taken in conformity to 28 USC 1257(2) as alleged;

2. The federal question sought to be reviewed was not timely or properly raised by Appellant, nor expressly passed upon by the State courts;

3. The judgment of the Michigan Supreme Court rests on an adequate non-Federal basis;

4. The appeal does not present a substantial federal question;

5. The grounds for appeal are fictitious and frivolous;

6. The appeal requests a review by the United States Supreme Court on grounds so general and so vague as to constitute merely a request to second

guess the Michigan Court on the merits of the case;

7. There being no good reason in law or fact for this appeal, this matter would waste the time and effort of the Court, as well as to overly burden an already overcrowded docket.

II. STATEMENT OF FACTS AND PROCEEDINGS

The Harrison Township Sewer Use Ordinance No. 104 was adopted by the Charter Township of Harrison (hereinafter "Township"), Plaintiff-Appellee, on November 24, 1969. It provided that all owners of residential property in the Township connect to the public sanitary sewer system. Defendants-Appellants, Edward Dobreff and Barbara Dobreff (hereinafter "Appellants") thereafter failed and refused to connect their on-sight residential septic field

treatment system to the Township Sewer System. A trial was conducted before the 41B Judicial District Court wherein Defendants were found to be in violation of Ordinance No. 104.

Thereafter, on October 26, 1977, this action was commenced by the Township seeking injunctive relief to compel Defendants to connect to the Township sanitary sewer system as required by Section 4 of Township Ordinance No. 104, and Public Act 288 of 1972, being MCLA 123.285; MSA 5.2769(155); which has been repealed and superseded by Public Act No. 368 of 1978, being MCLA 33.12753 and 33.12754; MSA 14.15(12753) and 14.15(12754).

Appellants responded to the complaint by asserting, as both a defense and counter-claim, that the Township

sewer system was in violation of the Water Pollution Prevention and Control Act, 33 USC 1251 et. seq. and Michigan Environmental Protection Act of 1970, MCLA 691.1201 et. seq.; MSA 14.528(201) et. seq. The relief sought by Defendants was not to enjoin the Township from violating said Acts, but only to restrain enforcement of the required sewer connection pursuant to Ordinance No. 104.

On July 10, 1979, the Township brought a Motion for Summary Judgment pursuant to General Court Rule 117.2(2) and (3), claiming that Appellants had failed to state a valid defense to the action, that there were no genuine issues of any material facts, and that Appellees were entitled to a judgment as a matter of law. The Macomb County Circuit Court granted said Motion on September 17,

1981, ruling that Appellant lacked standing under the Michigan Environmental Protection Act to allege a defense or counter claim based thereon. An Order in accordance with the Motion was entered on October 13, 1981. The Order directed Appellants to connect to the Township sewer system. Appellants Motion for Rehearing was denied on November 9, 1981. Appellants appealed to the Michigan Court of Appeals. The Michigan Court of Appeals affirmed the decision of the trial court. The Court of Appeals determined that Appellants could not make out a prima facie case under the Michigan Environmental Protection Act. The Court did not address or rule upon the constitutionality or applicability of the Federal Water Pollution Prevention and Control Act.

Appellants filed Leave to Appeal to the Supreme Court of Michigan. Leave to Appeal was denied on October 27, 1983. A Motion for Rehearing was denied on January 31, 1984.

III. ARGUMENT

A.

Appellants specifically rely upon 28 USC 1257(2) as the sole basis of the instant appeal. That statute provides, in pertinent part, as follows:

> "The final judgment or decree rendered by the highest Court of a state in which a decision can be had, may be reviewed by the Supreme Court as follows: . . .(2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnate to the constitution, treaties or laws of the United States, and the decision is in favor of its validity . . . "

The appeal in the case at bar does not conform with the quoted statute and therefore, the appeal is not within

the jurisdiction of this Court. In the state proceedings, Appellants argued as an affirmative defense and counter-claim that the Harrison Township sewer treatment system feeds into the City of Detroit System and that the latter system is in violation of a discharge permit issued under the Water Pollution Prevention and Control Act, 33 USC 1251 et. seq. As a result of the foregoing, Appellants argued that compelling further connection with the sewer treatment system would constitute a violation of the Michigan Environmental Protection Act of 1970, being MCL 691.1201 et. seq.; MSA 14.528(201) et. seq. Appellants did not allege nor argue that the Michigan Law or the Township Ordinance was unconstitutional in any respect. In fact, Appellants did not allege nor argue that

the Michigan Environmental Protection Act was in violation of any Federal Law.

Appellants now argue for the first time that the Michigan Act is violative of the Federal Water Pollution Prevention and Control Act. In this regard, Appellants are simply attempting to rely on the alleged violation of a Federal Discharge Permit by the City of Detroit as a basis for seeking personal injunctive relief. The relief sought by Appellants is not to enjoin the Township from violating either the Federal or State Acts, but only to restrain enforcement of Appellants required connection. The Supreme Court lacks jurisdiction when a suit does not challenge the constitutionality of a state law but only requests personal relief solely to vindicate individual

claims. See Dasker v Supreme Court of Texas, 650 Fed 2nd 711 (1981). The individual nature of Defendant's claim was noted in the opinion of the Circuit Court.

The State courts properly ruled that Appellants lacked appropriate standing to rely on the Michigan Act as a shield to the enforcement of a valid Township Ordinance and, consequently, no constitutional issue was ever raised and the State courts could not, and did not, expressly address any constitutional question. Moreover, the State courts did not address or review the validity of the State Act as neither party questioned the validity of said Act.

When the highest court of a state has failed to pass upon a federal question, the omission is presumed to be

due to want of presentation in that court. See Street v New York, 394 US 576, 895 S Ct 1354, 22 L Ed 2d 572 (1969). It is the obligation of the party seeking review of the federal question in this Court to affirmatively demonstrate the contrary before the appeal will be heard. Webb v Webb, 451 US 493, 101 S Ct 1889, 68 L Ed 2d 392 (1981). In that Appellants have failed to affirmatively and adequately show that the required issues were presented and argued in the State court, Appellees submit the Motion for dismissal should be granted and the appeal dismissed, with an award of costs to Appellees.

B.

An appeal from a state court to the United States Supreme Court should be dismissed if a valid interpretation of

the statutes involved is fairly possible by which the question of unconstitutionality or repugnancy can be avoided. See United States v Clark, 445 US 23, 100 S Ct 895, 63 L Ed 2d 171 (1980). In the case at bar, the Water Pollution Prevention and Control Act and the Michigan Environmental Protection Act are both statutes attempting to protect the environment and the public. The Acts are expressly designed to work together to achieve their desired goals. 33 USC 1253. It is clear that the Federal Act concedes the promulgation of state statutes to protect the environment and the public in accordance with the conditions imposed by the Federal Act. Appellants concede that the States are free to adopt more stringent standards than those imposed by the Federal Act.

Appellants further concede that the Michigan Environmental Protection Act of 1970 sets more stringent requirements than the Federal environmental regulations. Therefore, the failure of Appellants to establish a prima facie case under the Michigan Act would consequently mean that there has also been no violation of the Federal Act.

By holding that Appellants lacked the necessary standing to allege a violation of the Michigan Environmental Protection Act, the state courts, in effect, left the issue of the alleged violation of the Federal Act to the Federal Courts. The State Law was not interpreted as requiring less stringent standards than the Federal Act, as that Act has been interpreted by the Federal Court in the case of United States v

State of Michigan, City of Detroit, et al., Civil Action No. 77110, US District Court for the Eastern District of Michigan, Southern Division. The Court therein, by way of a Consent Judgment, sets forth very explicit and detailed measures for controlling the alleged violations of the Federal Water Pollution Control Act. It is significant to note that the Court does not include in its list of remedies any moratorium on new customers being added to the system. To the contrary, the Court does note a drastic need for increased capital and suggests an increase in rates charged to the current customers of the system. There is a strong intimation that new customers would be welcomed into the system in direct opposition to Appellant's argument in this regard. In

any event, the refusal of the state court to recognize or deal with alleged violations of the Federal Act does not constitute a Federal question.

Even assuming arguendo that Appellants do raise a valid Federal question, the appeal in the case at bar is still defective. In order for an appeal pursuant to 28 USC 1257(2) to be appropriate, there must be presented not only a Federal question, but a substantial Federal question. Wick v Chelan Electric Company, 280 US 108, 50 S Ct 41, 74 L Ed 212 (1929); Zucht v King, 260 US 174, 43 S Ct 24, 67 L Ed 194 (1922).

The Circuit Court and Court of Appeals concluded that even taking Appellants assertions as true, the result of enforcing the Township Ordinance would have a minimal affect on the alleged

violation of the Federal pollution laws. To determine that any pollution would occur through the enforcement of the Ordinance would be merely speculative. The impact of requiring Appellants to connect to the sewer system were recognized to be de minimus. The Court of Appeals, interpreting the Michigan Environmental Protection Act, ruled that a speculative showing of a de minimus amount of pollution was not sufficient to grant standing to Appellants to argue a violation of the Michigan law.

It is clear, from a review of the opinions of the Circuit Court and the Court of Appeals, copies of which are included in Appellants' Appendix attached to the Jurisdictional Statement, that the findings of both Courts were based solely on non-federal grounds. Those opinions

are fully supportable on non-federal grounds. There is no basis upon which Appellants can logically argue that a substantial Federal question is presented.

The alleged violation of a Federal discharge permit does not, in and of itself, qualify as a Federal matter, especially in light of the fact that the Federal Court has acquired jurisdiction over that case and is working to fashion an equitable and legal remedy thereto. If they desire, Appellants could attempt t, intervene in that action if they feel that the Federal requirements are not being adequately met. The state court system is a totally inappropriate forum for the review of Appellants' arguments in this regard. To now allege on appeal that the refusal of the state courts to

attempt to fashion a remedy for alleged violations of the Federal Act somehow raises a Federal question within the jurisdiction of this Court is incredible.

Appellants correctly state that there does exist a valid state enabling act authorizing the enactment of Township Ordinances to require connection to public sanitary sewers. The Township Ordinance promulgated pursuant thereto, a copy of which appears on Page (Ten) 10 of Appellants' Jurisdictional Statement, is a recognized exercise of an appropriate police power of a municipality. See Hutchinson v Valdosta, 277 US 303, 33 S Ct 290, 57 L Ed 520, 523 (1913), accord Bedford Township v Bates, 62 Mich App 715 NW 2d 706 (1975). The enforcement of that Ordinance does not create any issues worthy of review by this Court.

Appellees respectfully submit that the reasons set forth for the appeal in this cause are fictitious and frivolous. Appellants are merely attempting to achieve a technical and arbitrary reversal of a proper decision of the state court. In effect, Appellants are requesting this Court to second guess the opinions of the Michigan Supreme Court and the Michigan Court of Appeals which were not grounded in any way on Federal law. The allegations of Appellants relative to the so called substantial Federal questions fall far short of those necessary to confer jurisdiction on this Honorable Court. There is no valid justification for the Court or the litigants to spend any

further time, effort or expense in the litigation of this particular cause.

CONCLUSION

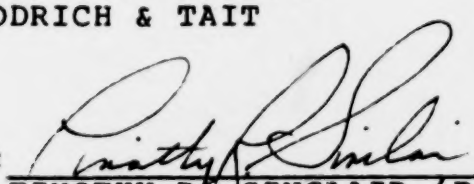
The decision below is an exercise of appropriate judicial interpretation of a state act. No substantial Federal question is involved. Appellants have sought to impose an unwarranted appeal on an already overburdened docket. Appellees respectfully submit that the appeal should be dismissed for lack of jurisdictional requirements, with an

award of all costs and expenses to Appellees.

It is so moved.

Respectfully submitted,

HILL, LEWIS, ADAMS,
GOODRICH & TAIT

By: 

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